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No. 2735.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

PACIFIC COAST CASUALTY COMPANY, a Corporation,

Plaintiff in Error,

vs.

GENERAL BONDING AND CASUALTY INSURANCE COMPANY, a Corporation,

Defendant in Error.

Petition for Rehearing.

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Filed this .....day of April, 1917.

....., Clerk.

By.....Deputy Clerk.

The James H. Barry Co.,
San Francisco

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PETITION FOR REHEARING.

We respectfully submit the following matters which we believe entitle the plaintiff in error to a rehearing before this Honorable Court:

Certain principles expressed in the opinion of this Court filed on the 5th day of March, 1917, will, if they be the law, materially alter the practice of casualty insurance companies throughout this country. With all due deference to this Honorable Court we believe that further consideration of the points involved herein would lead to a different conclusion.

FIRST: A careful study of the opinion leads us to the conclusion that the issues respecting the authority of John Davis to represent the plaintiff in error as attorney in fact, and the indemnity agreement set out in the complaint, have been practically eliminated from the case, even though there is language in the opinion adverse to the contention of plaintiff in error. The record discloses the fact that Meador & Davis were authorized to take an appeal, but not to furnish a supersedeas bond. That bond was to be obtained by the assured. Of course taking an appeal is quite distinct from the giving of a stay bond as an appeal is consummated when the jurisdiction of the higher court is properly and regularly invoked, and the evidence and legal points involved in the case are presented to the appellate tribunal in the manner required for their proper determination. The appeal might be prosecuted without any stay bond, and for that matter the judgment might be satisfied pending an appeal. The only authority which Davis had was to appeal. The scope of his agency is not left to conjecture as the letter of instructions was introduced in evidence, and is quoted in the opinion itself. This letter of instructions to Davis was delivered by Mr. Davis to Mr. Stephenson, the president of the defendant in error (Record, pages 134, 135, 136). Stephenson admits that he received the letter (Record, page 130). And the letter was actually produced from Stephenson's files when his deposition was taken

(Record, page 126). Stephenson himself testified that he had information that Meador & Davis had a power of attorney, but says that he does not know the extent of their power (Record, pages 125-126). Certainly under the authorities set out in our brief herein, at pages 51 to 53, the defendant in error was charged with the duty of ascertaining the extent of Davis' authority, and was chargeable with knowledge of the limitation placed upon him. The president of the General Bonding and Casualty Insurance Company could not relieve himself from this presumption by mere carelessness in failing to read the letter presented to him, or by neglect to make seasonable inquiry of Davis himself as to what his authority really was in the premises.

With respect to Seinsheimer & Co. it is in evidence that that firm ceased to be the agents of the Pacific Coast Casualty Company prior to July 30, 1912 (Record, page 144), and the indemnity agreement was signed by John Davis August 6, 1912. As to this there is no contradiction in the record, and we feel there is no evidence tending to sustain the opinion of this Honorable court that Leeds was the managing partner of an agent of the plaintiff in error when he came into possession of such knowledge as he may have had respecting the procuring of the supersedeas bond, and the execution by Davis of an indemnity agreement. We believe, therefore, that the finding that the knowledge of Davis and Leeds was to be

imputed to the plaintiff in error is not warranted by the facts of the case. The agency with which Leeds was connected was "confined to the matter of accident insurance, liability insurance, etc." (Record, page 117). Davis was specifically directed that the plaintiff in error would not furnish the supersedeas bond, and we respectfully submit that the knowledge of an agent, or an attorney, who has exceeded his authority, or done that which he was expressly directed not to do, is not imputable to the principal unless direct proof is furnished that said principal was actually conversant with the facts, and the record is entirely silent on the question as to whether or not the Pacific Coast Casualty Company ever knew that Davis had procured the supersedeas bond, or had given the indemnity agreement to the defendant in error.

One element of the case which seems to have had weight with the trial Court was the fact that ultimately the plaintiff in error paid the premium on the supersedeas bond. But this manifestly was done in the ordinary course of business as the policy of insurance originally issued to the Elmo Rock Company bound the plaintiff in error to pay the expense of the litigation, and the premium on the cost bond was merely one item of expense. There is nothing in the record tending to show that at the time the premium was paid the plaintiff in error was aware, or had any reason to believe, that contrary to instructions the bond had been procured in the name of the

plaintiff in error, or an indemnity agreement had been given by John Davis, falsely representing himself to be its attorney in fact. It is the uniform custom of casualty insurance companies to pay the premium upon a bond precisely as they would pay the fees of court reporters, witnesses or jurors, or costs of investigating the case, the charges of experts, and all the other and varied items of expense attendant upon more or less protracted litigation. The premium on a bond on appeal would be considered by the company in the same light as the payment of the cost of printing and filing a transcript or brief. And nowhere does it appear that Davis, Leeds, The Elmo Rock Company, or the defendant in error, ever acquainted the plaintiff in error with the fact that its representative had procured this bond, and that the payment was made on its own account, and not on behalf of the assured. As we have said above, however, the opinion of the Court seems to us to proceed upon another point as there would be no occasion for modification of the amount of the judgment if the indemnity agreement were sustained as a valid contract, and the actions of Leeds and Davis were held to be binding upon the plaintiff in error.

SECOND: We come, therefore, to the two main propositions upon which this Honorable Court seems to place reliance. They are, first, that it was the duty of the plaintiff in error, if it desired to appeal, to

protect the assured by giving a supersedeas bond, and, second, that the policy of insurance issued by the plaintiff in error was assignable after the liability of the assured became established by judgment.

We respectfully urge that the view taken by this Honorable Court upon each of these questions is not correct. It certainly is not in accordance with what we understand to have been the uniform practice of insurance companies in the conduct of their business. We have cited numerous cases in our brief filed herein (pages 54 to 63 inclusive), to show the meaning which the Courts have placed upon a policy of insurance such as the one which is involved in the case at bar. It was not an insurance against liability, but was an insurance against loss sustained and paid by the assured. The agreement was that the Pacific Coast Casualty Company would defend any action brought against the assured, defray the expense thereof, and pay to the assured any amount up to $5,000.00 that may have been expended by the assured in satisfaction of a final judgment. The very essence of the contract was that the plaintiff in error would indemnify the assured, and would pay after the assured had paid, and only in the event that the assured did sustain loss. While it is true that the Pacific Coast Casualty Company reserved the right to handle the defense, and had full control of an appeal, we submit that a fair construction of the contract would not be that the insurer was also obliged

to furnish a supersedeas bond. In doing so the insurer would be called upon to materially enlarge its original contract as embodied in the policy. Such a rule would place upon the Company the burden of paying the judgment in all events if it were sustained by the Appellate Court. In other words, its original contract that it would pay if the Elmo Rock Company paid, would, under the rule enunciated in the opinion of this Honorable Court, be transformed into a contract that it would pay upon affirmance of the judgment, irrespective of whether the Elmo Rock Company paid or could pay.

To the suggestion made in the Court's opinion that to hold otherwise would leave the assured unprotected pending the appeal, it seems that the clear answer is that if execution is taken out pending the determination of the case upon appeal, and is satisfied by the assured, then to that extent the judgment is a final judgment, paid by the assured, and the assured is clearly entitled to indemnity irrespective of the right still remaining in the insurer to proceed with the appeal if it so desired. See *Upton Cold Storage Company* vs. *Pacific Coast Casualty Company,* 162 N. Y. App. Div., 842.

The purpose of this form of insurance being to protect the property of the assured, it has often happened that the insurance companies were not called upon to pay a judgment against the assured because such assured was itself bankrupt, and unable to re-

spond in damages. And as the contract is one between the company and the assured it is but right, in our opinion, that the insurance company should stand upon the exact terms thereof, and avail itself of the saving which often results from such a situation. This contingency is taken into consideration in the fixing of the rates charged for the insurance itself, and as a policy such as the one given the Elmo Rock Company is a contract for the benefit and protection of the employer, and not the injured workingman, we see no sound reason why the interpretation placed upon it by insurance companies generally is not a correct and fair one. If the policy were in the first place one for the benefit of the workingman it would come under what is known as workingmen's collective insurance, and not employer's liability insurance. It would partake more of the nature of accident insurance, and the rate charged therefor would be greatly increased.

We feel, therefore, that the opinion of this Honorable Court holding that the insurer is obligated to protect the assured by furnishing a supersedeas bond is erroneous. Similar considerations underlie our contention supported by cases cited, that the policy of insurance was nonassignable until after payment by the assured. The Elmo Rock Company never paid this loss; it never became entitled to any reimbursement from the insurer and we respectfully urge that the condition requiring payment of the judg-

ment is a condition precedent, and that where the assured has not actually made the payment there is no right of action whatsoever upon the policy (See condition L, Record, page 73).

We have set out the authorities upon which we rely at considerable length in the briefs filed herein, and have not repeated them in this petition as we feel that it would merely encumber the record, but we respectfully urge that the decision of this Honorable Court marks so serious a departure from the general understanding and practice existing in insurance circles that it should be further considered upon rehearing herein, and we believe that upon further reflection this Honorable Court would reach an entirely different conclusion.

Respectfully submitted.

MYRICK & DEERING,
JAMES WALTER SCOTT,
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I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

JAMES WALTER SCOTT,
Attorney for Plaintiff in Error.